Supreme Court, U.S.
FILED
OCT 30 2000
CLERK

(2)

No.00-490

IN THE
SUPREME COURT OF THE UNITED STATES

PITTSBURG COUNTY RURAL WATER DISTRICT NO.7,
Petitioner,

v.

CITY OF MCALESTER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONSE TO CROSS PETITION

WESLEY BROWN
BROWN & BROWN
417 E. CHEROKEE
MCALESTER, OK 74501
(918) 423-4606

LINDA C. MARTIN *
JAMES C. MILTON
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
320 SOUTH BOSTON AVENUE
SUITE 500
TULSA, OK 74103-3725
(918) 582-1211

Counsel for Respondents

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

21pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT AGAINST GRANTING PITTSBURG'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI 1

ARGUMENT 1

Every federal court to consider the issue has rejected the argument advanced by Pittsburg in its Cross Petition that it should receive continued Section 1926(b) protection based on federal loans that were satisfied in full. 3

ARGUMENT 2

Pittsburg has misinterpreted and overstated the test adopted by a handful of federal courts, offered here by Pittsburg as a "bright line rule." 10

CONCLUSION 16

TABLE OF AUTHORITIES

Federal Cases

Bell Arthur Water Corp. v. Greenville Util. Comm'n,
173 F.3d 517 (4th Cir. 1999) 6

Bell Arthur Water Corp. v. Greenville Utils. Comm'n,
972 F. Supp. 951 (E.D.N.C. 1997), *aff'd*,
173 F.3d 517 (4th Cir. 1999) 4, 6

Lexington-South Elkhorn Water Dist. v. Wilmore,
93 F.3d 230 (6th Cir. 1996) 10, 14, 15

North Alamo Water Supply Corp. v. San Juan,
90 F.3d 910 (5th Cir.), *cert. denied*,
519 U.S. 1029 (1996) 10, 11, 14

Rural Water System #1 v. Sioux Center,
967 F. Supp. 1483 (N.D. Iowa 1997),
aff'd in part & rev'd in part, 202 F.3d 1035
(8th Cir.), *cert. denied*,
68 U.S.L.W. 3774 (2000) . . . . . *passim*

Rural Water System #1 v. Sioux Center,
202 F.3d 1035 (8th Cir. 2000),
cert. denied, 68 U.S.L.W. 3774 (2000) 5

*Scioto County Regional Water Dist. No. 1 v.
Scioto Water, Inc.*, 103 F.3d 38
(6th Cir. 1996), *cert. denied*,
521 U.S. 1111 (1997) . . . . . *passim*

Sequoyah County Rural Water Dist. No. 7 v. Muldrow, 191 F.3d 1192 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000) 3, 11, 15

State Cases

Grand Junction v. UTE Water Conservatory Dist., 900 P.2d 81 (Colo. 1995) 7, 8

Mariposa County v. Merced Irrigation Dist., 196 P.2d 920 (Cal. 1948) 12

Public Water Supply Dist. No. 10 v. Peculiar, 971 S.W.2d 849 (Mo. Ct. App. 1998) 4, 6

West Norman Timber, Inc. v. State, 224 P.2d 635 (Wash. 1950) 12

Wetumpka v. Central Elmore Water Auth., 703 So. 2d 907 (Ala. 1997) 7

Federal Statutes

7 U.S.C. § 1926(b) 1, 3, 10, 15

7 U.S.C. § 1929a 3, 8, 9

State Statutes

Okla. Stat. tit. 82, § 1324.2(7) 12, 13

Okla. Stat. tit. 82, § 1324.3 11

Okla. Stat. tit. 82, § 1324.12 . . . . . 12, 13, 14

Federal Regulations

7 C.F.R. § 1942.17(e)(1) 15

7 C.F.R. § 1942.17(n)(2)(vii) 14

STATEMENT OF THE CASE

Pittsburg's Statement of the Case is incomplete in at least one respect. Pittsburg asserts on page 9 of its Cross-Petition that it purchased its original federal loans in 1989. This assertion is inconsistent with the conclusion reached by the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit concluded that while Pittsburg "repurchased" its outstanding indebtedness to the FmHA, its promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA." [Appendix A, at p. 5a.] This distinction between Pittsburg's assertion and the Tenth Circuit's factual conclusion is important because of existing circuit-made case law on the impact on Section 1926(b) protection of the satisfaction of an outstanding loan from the FmHA.

ARGUMENT AGAINST GRANTING PITTSBURG'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

McAlester agrees with Pittsburg on one issue: that the test for application of 7 U.S.C. § 1926(b) should be reviewed by the U.S. Supreme Court. In its conditional cross petition for writ of certiorari, Pittsburg argues that the Court should adopt a "bright line rule" for application of Section 1926(b). Pittsburg supports its proposed "bright line rule" with selective quotation from a few decisions from courts that have taken an extreme approach to Section 1926(b) interpretation.

The complexities of state law cause such a "bright line rule" to be unworkable. In some states, the established territory of a rural water association qualifying for federal loans is determined on a step-by-step basis, with each addition to the territory approved after a careful analysis of the needs of the area and the capacity of the rural water association. In

other states, such as Oklahoma, the state statutes governing creation of a rural water association allow a one-time formation document to include a description of a vast and typically vaguely described area as the association's territory. The association's original territory could include areas that are located significant distances from the association's water distribution facilities. In some cases, an association's territory includes land that is separated from the association's water distribution facilities by a highway or a body of water. As a result, it is nearly impossible for the association to serve the water needs of its entire territory without substantial additional capital expenditures.

Pittsburg's position on the "bright line rule" must be viewed with skepticism, particularly when it is understood that Pittsburg would argue against any action by governing state agencies to remove an area from a rural water association's territory. [Appendix D, at p. 50a.] The "bright line rule" would provide anticompetitive protection for areas that were included within a rural water association's territory long before the association borrowed funds from the federal government. The anticompetitive protection would apply even if the association has insufficient capacity or facilities to serve the area. Under Pittsburg's proposed scheme, landowners in the area would be powerless to remove their land from the rural water association's territory.

In short, Pittsburg's proposed "bright line rule" ignores the clear terms of the statute. The rule proposed by Pittsburg should be rejected in favor of the standard offered by McAlester in its Petition for Writ of Certiorari, filed in Case No. 00-323.

ARGUMENT 1

Every federal court to consider the issue has rejected the argument advanced by Pittsburg in its Cross Petition that it should receive continued Section 1926(b) protection based on federal loans that were satisfied in full.

The first question presented by Pittsburg's Cross Petition rests solely on a legal issue – whether Section 1926(b) protection was extinguished when Pittsburg satisfied its obligations to the FmHA in 1989. The Agricultural Credit Act of 1987 contained a provision known as "subsection (g)," stating that 7 U.S.C. § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold" under the Agricultural Credit Act. *See* 7 U.S.C. § 1929a note ("Applicability of Prohibition on Curtailment or Limitation of Service"). *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 40 (6th Cir. 1996), *cert. denied*, 521 U.S. 1111 (1997). Pittsburg's Cross Petition raises the issue of whether subsection (g)'s provision that Section 1926(b) applies to "all" obligations "sold or intended to be sold" means that Section 1926(b)'s protection extends to a borrower that buys back its own loans from the FmHA, effectively extinguishing them. *Id.*

Every federal court that has addressed this issue, including the District Court and Tenth Circuit in this case, has decided the issue in McAlester's favor. *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 43 (6th Cir. 1996), *cert. denied*, 521 U.S. 1111 (1997); *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192, 1200 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000); *Bell Arthur Water Corp. v.*

Greenville Util. Comm'n, 173 F.3d 517, 523 (4th Cir. 1999), *aff'g* 972 F. Supp. 951, 957-59 (E.D.N.C. 1997); *Rural Water System #1 v. Sioux Center*, 967 F. Supp. 1483, 1523 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir.), *cert. denied*, 68 U.S.L.W. 3774 (2000); *see also Public Water Supply Dist. No. 10 v. Peculiar*, 971 S.W.2d 849, 852 (Mo. Ct. App. 1998).

The *Scioto County* court was the first federal court to address the argument raised in this case by Pittsburg in its first question presented on petition for certiorari. The plaintiff rural water association in Scioto County argued that bond issuers (or FmHA borrowers) "that exercised their right to buy back their bonds are entitled to the same § 1926(b) curtailment protection that is available to third-party bond purchasers." *Id.* The plaintiff rural water association argued that viewing subsection (f) and subsection (g) together leads to the conclusion "that the bond issuer's right of first refusal incorporates the right to continued protection against curtailment." *Id.* "Water 1 insists that it is therefore entitled to the same § 1926(b) protection that would have been available to a third-party purchaser of its bonds." *Id.*

In *Scioto County*, the court's conclusion on this issue rested on one critical fact. The plaintiff rural water association's obligation to FmHA was marked "paid in full." *Id.* at 42. As a result, its FmHA debt "was thus discharged, not sold." *Id.* Based on this critical fact, the *Scioto County* court concluded that "[w]hen an [FmHA bond] issuer buys back it own bond and cancels the debt, ... it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to one of the main legislative purposes in enacting § 1926(b) – safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest

in protecting against competition diminishes as its loans are repaid." *Id.*

This holding by the *Scioto County* court is conclusive in this case. The earlier FmHA loans received by Pittsburg were repaid in 1989. As the trial court found, "[t]he promissory notes to the FmHA were marked 'SATISFIED IN FULL - FmHA' and the debt was no longer carried upon [Pittsburg's] financial records." [Appendix D, at p. 38a.] As a result, the FmHA obligations of Pittsburg were extinguished in 1989, and any Section 1926(b) protection enjoyed by Pittsburg ended at that time.

This conclusion is consistent with the decisions of all subsequent federal courts that have addressed the issue of the cancellation of FmHA indebtedness. In 1997, the U.S. District Court for the Northern District of Iowa conducted an in-depth review of legislative history related to the issue of the impact of extinguishment of FmHA debt on Section 1926(b) protection. *Sioux Center*, 967 F. Supp. at 1521-23. Based on this review, the *Sioux Center* court determined that it "can only conclude ... that the protection of § 1926(b) through subsection (g) does not extend to a party such as RWS #1 who bought back its notes pursuant to subsection (f), and thereby extinguished them. Consequently, RWS #1 lost the protections of § 1926(b) when it bought back its notes in 1988 and did not regain any protection of § 1926(b) until RWS #1 again became indebted to the United States in 1992." *Id.* at 1523. In *Sioux Center*, the plaintiff rural water association's FmHA loans were marked "paid in full" at the time that they were refinanced. *Id.* at 1502. The district court's decision was recently affirmed in pertinent part by the U.S. Court of Appeals for the Eighth Circuit. *Rural Water System #1 v. Sioux Center*, 202 F.3d 1035 (8th Cir.), *cert. denied*, 68 U.S.L.W. 3774 (2000).

Also in 1997, the U.S. District Court for the Eastern District of North Carolina the issue of the impact of extinguishment of FmHA debt on Section 1926(b) protection. *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 972 F. Supp. 951, 956-59 (E.D.N.C. 1997). In *Bell Arthur*, the plaintiff rural water association conceded that its earlier FmHA debt "may technically have been 'satisfied' or 'paid in full.'" *Id.* at 956. Nonetheless, the plaintiff rural water association argued that its participation in a congressionally authorized "buy-out" program – the same program addressed by the *Scioto County* and *Sioux Center* courts – provided it with continued Section 1926(b) protection. *Id.* Relying on *Scioto County* and *Sioux Center*, the *Bell Arthur* court concluded that "any protection afforded to BAWC pursuant to § 1926(b) was extinguished when it paid off its FmHA loans in 1987." *Bell Arthur*, 972 F. Supp. at 959. The district court decision was affirmed by the U.S. Court of Appeals for the Sixth Circuit, which specifically affirmed the district court's decision on this issue. *Bell Arthur Water Corp. v. Greenville Util. Comm'n*, 173 F.3d 517, 523 (4th Cir. 1999).

On June 16, 1998, the Missouri Court of Appeals addressed the issue of the impact on Section 1926(b) protection of the extinguishment of FmHA debt. *Public Water Supply Dist. No. 10 v. Peculiar*, 971 S.W.2d 849, 852 (Mo. Ct. App. 1998). The *Peculiar* court noted that "[n]either subsection (g) nor any other statutory language mentions service area protection in the event a water district takes advantage of its right of first refusal and decides to refinance its loan through issuance of refund bonds or a conventional bank loan." *Id.* at 852. In *Peculiar*, the rural water association "extinguished its indebtedness to FmHA in July, 1987 when it repurchased [its] 1983 bonds, and FmHA returned them, marked 'Cancelled.'" *Id.* Based on these

facts, the *Peculiar* court concluded that the rural water association "did not intend that the debt on the 1983 bonds remain outstanding. Instead, it issued a new series of bonds and sold them to various private parties to finance the repurchase and subsequent cancellation of the\1983 bonds. When faced with identical fact situations, where a rural water district refinances its FmHA loan and in the process completely extinguishes its debt on the bonds purchased by [sic] the government, other jurisdictions hold that § 1926(b) protection is lost." *Id.* at 853.

In its conditional cross petition for writ of certiorari, Pittsburg is faced with a difficult challenge on this issue. Pittsburg cannot avoid the fact that all federal courts that have addressed the issue have concluded that Section 1926(b) protection ends when an FmHA loan is paid and marked as "satisifed" or "paid in full." Pittsburg cannot avoid the fact that the most critical factual issue relied upon by the *Scioto County*, *Sioux Center*, and *Bell Arthur* courts is clearly against Pittsburg in this case: As the trial court found, "[t]he promissory notes to the FmHA were marked 'SATISFIED IN FULL - FmHA.'" [Appendix D, at p. 38a.] Faced with this daunting challenge, Pittsburg can turn only to two state-court decisions that have reached a different conclusion on narrow and distinguishable facts. [Cross Petition, at pp. 12-13 (citing *Grand Junction v. UTE Water Conservatory Dist.*, 900 P.2d 81 (Colo. 1995), and *Wetumpka v. Central Elmore Water Auth.*, 703 So. 2d 907 (Ala. 1997).

The decision by the Supreme Court of Colorado in *Grand Junction v. UTE Water Conservatory District* was closely examined by both the *Scioto County* and *Sioux Center* courts. In *Scioto County*, the U.S. Court of Appeals for the Sixth Circuit distinguished the *Grand Junction* decision. "In that case, the Colorado court found that § 1926(b)'s

protection extends to those that buy back bonds only if the bonds are reacquired 'with the intent not to discharge the instrument.' 900 P.2d at 92. The *Ute Water* court analyzed the question of intent and looked to Colorado law to determine whether the reacquisition of a bond discharged the debt. Unlike the loan documents in *Ute Water*, the loan documents in this case were marked 'paid in full.'" *Scioto County*, 103 F.3d at 42. The point of distinction upon which the *Scioto County* court relied was the rural water association's treatment of the paid FmHA obligation. In *Scioto County*, as in the case before this Court, the FmHA obligation was marked as paid in full.

Pittsburg's treatment of this issue in its conditional cross petition for writ of certiorari, and in particular its treatment of the *Scioto County* decision, reveals the weakness of its position. Pittsburg's only effort to persuade this Court to disagree with the *Scioto County* decision is to argue that the *Scioto County* court determined that Section 1926(b) protection "is only extended when the notes are purchased by third parties," and to argue that "such decision ignores the plain language of [7 U.S.C. § 1929a]." [Cross Petition, at p. 12.]

First, Pittsburg's characterization of the *Scioto County* court's decision misstates its rationale. The *Scioto County* court concluded that "[w]hen an issuer buys back its own bond and cancels the debt, ... it no longer qualifies as a debtor for § 1926(b) protection." *Scioto County*, 103 F.3d at 42. Thus, the *Scioto County* court leaves open the possibility that, in a *Grand Junction* circumstance where "a bond issuer ... reacquire[s] its own bond without extinguishing the debt," as allowed by Colorado law. *Id.* at 41.

Second, Pittsburg offers no support whatsoever for its conclusory argument that the *Scioto County* decision "ignores the plain meaning" of 7 U.S.C. § 1929a. Without elaboration by Pittsburg regarding its "plain meaning" argument, it would be difficult for the Respondents to respond to the argument. However, Pittsburg may be referring to arguments raised by the plaintiff rural water association in *Sioux Center*. In *Sioux Center*, the plaintiff argued that the plain meaning of subsection (g) to 7 U.S.C. § 1929a would include, within the extended protection offered by subsection (g), those FmHA bonds that are repurchased by the rural water association that is obligated on the bonds. *Sioux Center*, 967 F. Supp. at 1516-20. The *Sioux Center* court rejected that argument, holding that "it is irrational to read subsection (g) as including notes sold under subsection (f) within a strained reading of notes 'intended to be sold under this section,' when a sale under subsection (f) involves significantly different timing and terms from a sale under subsections (a)-(e)." *Sioux Center*, 967 F. Supp. at 1520.

The Court should reject Pittsburg's request for certiorari review of this issue. Pittsburg has failed to show a disagreement among the federal courts addressing the issue. The federal courts that have addressed the issue have properly applied federal statutory law, and have determined that a rural water association that satisfies its federal debt, whether through refinance or repurchase, is no longer entitled to Section 1926(b) protection based on that debt.

ARGUMENT 2

Pittsburg has misinterpreted and overstated the test adopted by a handful of federal courts, offered here by Pittsburg as a "bright line rule."

McAlester agrees with Pittsburg that the Court should review and address the proper standard for application of the anticompetitive protection found in 7 U.S.C. § 1926(b). The "bright line rule" offered by Pittsburg in the second question presented in its conditional cross petition for writ of certiorari, however, is inconsistent with the terms of the statute.

The terms of Section 1926(b) require, as a condition for any anticompetitive protection, that a rural water association make water service available to its claimed customers. The nature of rural water associations formed under state law requires that the complexities of state law be considered in determining whether the association has made service available. The federal courts faced with the issue have looked to state law to determine the boundaries of the rural water association, and to determine whether a rural water association has made service available. *Sioux Center*, 967 F. Supp. at 1525, 1530; *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996); *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 234-35 (6th Cir. 1996).

The *Sioux Center* court defined the importance of state law to this determination. "State law, and only state law, ... defines a municipality's right to annex portions of the association's service area, just as state law, and only state law, otherwise defines where it is the association can legally

initiate or continue to provide service. If the association again becomes indebted to the FmHA, its protected service area is defined by state law as of the date of the renewed indebtedness." *Sioux Center*, 967 F. Supp. at 1530.

At least one court has determined that a state law duty to provide service "is the legal equivalent to" making service available under Section 1926(b). *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 916 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996). In the case at bar, the Tenth Circuit was asked to determine whether Oklahoma law imposed on rural water associations a duty to serve their customers. The Tenth Circuit determined that state law imposed no such duty to serve. *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192, 1202 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000).

In urging a reversal of the Tenth Circuit on this issue of state law, Pittsburg references several provisions of the Oklahoma statutes governing formation of rural water districts. First, Pittsburg urges that its claimed legal obligation to serve "residents within its Territory" is found in Okla. Stat. tit. 82, § 1324.3. Section 1324.3 provides that "[p]ublic nonprofit rural water districts ... may be organized under this act for the purpose of developing and providing an adequate rural water supply, gas distribution facilities, sewage disposal facilities and solid waste management system to serve and meet the needs of rural residents within the territory of the district." Okla. Stat. tit. 82, § 1324.3 (1991). This statement of purpose falls far short of the creation of a duty to provide water service, or any other utility, to residents of the rural water district's territory.

To extend the general statements contained in Section 1324.3 to impose an obligation on Oklahoma rural water

associations would be contrary to general principles of statutory construction. Courts generally are not eager to interpret statutes as imposing obligations or liabilities on a state agency, unless the obligation is clearly stated in the statute. *See, e.g.*, *Mariposa County v. Merced Irrigation Dist.*, 196 P.2d 920, 925 (Cal. 1948); *West Norman Timber, Inc. v. State*, 224 P.2d 635, 640 (Wash. 1950). As the *Mariposa County* court concluded, "[s]tatutes are ordinarily designed for the government of citizens and residences rather than the state, and it is settled that the state is not bound by general words of a statute or code provision which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, unless the intent to bind it thereby otherwise clearly appears." *Mariposa County*, 196 P.2d at 925 (quoting 23 Cal. Jur. 625).

Second, Pittsburg points to the "benefit unit" system contained in Okla. Stat. tit. 82, § 1324.12 as the source of its claimed legal obligation to serve "residents within its Territory." The "benefit unit" system demonstrates that water service to residents within Pittsburg's territory is a function of Pittsburg's discretion, rather than a "duty to serve." Section 1324.12 provides as follows:

> . . . The total benefits of any such improvement shall be divided into a suitable number of benefit units. Upon determining a schedule of benefit units and unit fees, the board of directors shall cause a declaration of availability of such units for subscription to be entered in its minutes and except for residents of cities and towns as provided in paragraph 5 of Section 1324.2 of this title any individual who fails to become a participating member

> within thirty (30) days thereafter shall not be eligible to hold office as a director, nor shall any individual, firm, partnership, association, or corporation which fails to become a participating member within ninety (90) days after such declaration be qualified to participate at any meeting or vote at any election held thereafter unless such individual, firm, partnership, association, or corporation shall thereafter become a participating member. *Each landowner within the district shall subscribe to a number of such units in proportion to the extent he desires to participate in the benefits of the improvements. As long as the capacity of the district's facilities permits*, participating members of the district may subscribe to additional units upon payment of a unit fee for each such unit. *Owners or tenants of land located within the district who are not participating members may subscribe to such units as the Board in its discretion may grant*, and upon payment of the unit fee for each such unit shall be entitled to the same rights as original participating members.

Okla. Stat. tit. 82, § 1324.12 (Supp. 1997) (emphasis added).

As can be seen from the text of the statute, the "benefit units" referred to by Pittsburg in its conditional cross petition for writ of certiorari are available only at the rural water district's discretion and the occupant's desire. Okla. Stat. tit. 82, § 1324.12 (Supp. 1997). While Okla. Stat. tit. 82, § 1324.2(7) may provide "a legal right to one service connection," Section 1324.12 limits the availability of

additional benefit units to current subscribers, based on the capacity of the district's facilities. *Id.* Section 1324.12 further limits the availability of benefit units to "[o]wners or tenants of land located within the district who are not participating members" of the rural water association. Benefit units are available to such owners and tenants only upon the discretion of the rural water association's board. *Id.*

Finally, Pittsburg argues that its "legal duty to serve" can be found in the federal regulations governing FmHA loans. [Cross Petition, at p. 20 (citing 7 C.F.R. § 1942.17(n)(2)(vii)).] Faced with the absence of supporting state law, Pittsburg has turned to federal law as providing an obligation to provide service. In doing so, however, Pittsburg has overlooked the clear terms of the cases upon which it relies in making this argument. The legal obligation to provide water service, urged by Pittsburg, must be provided by state law, rather than by federal law. *See North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 916 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996). Pittsburg's claimed territory is determined by reference to state law, rather than to federal law. *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 234 (6th Cir. 1996); *Sioux Center*, 967 F. Supp. at 1530.

Pittsburg attempts to bootstrap the provisions of 7 C.F.R. § 1942.17(n)(2)(vii) into the Oklahoma statutes governing rural water associations, by pointing to the Oklahoma statute authorizing rural water associations to borrow money from the federal government. [Cross Petition, at p. 20-21.] The Court should reject this attempted bootstrap because Pittsburg has put the cart before the horse. Section 1926(b) protection, and its attendant regulations, do not apply to Pittsburg if Pittsburg has failed to meet the elements of Section 1926(b) protection. The federal obligation to provide

water, therefore, does not apply to Pittsburg until it can establish that it has "made service available." This is the conclusion that was reached by the Tenth Circuit in *Sequoyah*, when faced by the same argument by attorneys for Pittsburg. *Sequoyah*, 191 F.3d at 1203 n.9.

Even if this Court determines that an obligation to serve may be based on federal law, the regulation cited by Pittsburg does not provide the necessary obligation to serve. Section 1942.17 does not impose an obligation to serve. A rural water association may deny water service to a user within the district's service area, even if the user desires service. 7 C.F.R. § 1942.17(e)(1). Section 1942.17(e)(1) states that installation of water services is dependent upon the feasibility of such service. *Id.* Similarly, water service from a rural water district may be declined by the user. *Id.*

As these authorities demonstrate, Oklahoma law imposes no obligation to serve. Pittsburg has failed to demonstrate any source of an obligation to serve occupants within its territory. As a result, the "legal-duty-to-serve" test does not apply in this case. Furthermore, it is not enough in a Section 1926(b) case for Pittsburg to simply show that it has "a precisely-drawn service area," or that it has water lines in the general vicinity of the disputed area. *Lexington-South Elkhorn*, 93 F.3d at 234. A rural water association asserting anticompetitive protection based on 7 U.S.C. § 1926(b) should be required to show more. The clear text of Section 1926(b) requires, as a condition for anticompetitive protection, that the rural water association make service available. 7 U.S.C. § 1926(b) (protecting "[t]he service provided or made available through any such association"). To expand the concept of "made available" to reach areas that were never served by the claiming rural water association, that the rural water association could not serve, and that

simply fall within a geographic territory vaguely described in a years-old formation document would be to create a legal fiction that would destroy the purpose of Section 1926(b).

CONCLUSION

For the reasons outlined above, Respondent McAlester respectfully suggests that the Court deny Pittsburg's conditional cross petition for writ of certiorari. The first question presented by Pittsburg's cross petition raises an argument that has been universally rejected by the federal courts confronted with it. The second question presented is closely aligned with the issues raised by McAlester's Petition for Writ of Certiorari in Case No. 00-323. However, the second question is based upon a strained reading of legal authorities, and represents an attempt by Pittsburg to impose an onerous interpretation on Section 1926(b), one that would be entirely inconsistent with the statute's plain terms.

/s/_____
LINDA C. MARTIN, ESQ.
Counsel of Record

James C. Milton, Esq.
Doerner, Saunders, Daniel
& Anderson, L.L.P.
320 South Boston Ave., Ste. 500
Tulsa, Oklahoma 74103-3725
(918) 582-1211

Attorneys for Respondents